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Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL MONTES, JR.,
Petitioner,

vs.

JEFFREY P. RANSOM #6952; DEMARCUS F. BLACK #7574; WILLIE FAYE WASHINGTON; DAVID BONNER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL MONTES, JR.,
PETITIONER PRO SE
2735 HIDDEN MEADOW DR.
ARLINGTON, TEXAS 76006
817 – 642 - 0887 HOME

QUESTION PRESENTED

Daniel Montes, Jr. presents one (1) federal question of exceptional importance that affects every person who is arrested, subjected to excessive force through the use of excessively forceful tight handcuffs with notice and ignored, and or denied medical care by arresting officers and jailers, and is recurring.

Question One, the panel in harmful error ignores Supreme Court precedence in *Hope* and *Graham*, in conflict with the First, Fourth, Eighth, Fourteenth Amendments and Due Process Clause, in conflict with other circuits as to excessive force claims of physical assault while in handcuffs and excessively forceful handcuffing with notice and ignored, denial of medical care, and is recurring.

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PETITION FOR WRIT OF CERTIORARI

Daniel Montes, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS

The memorandum order of the United States District Court for the Northern District of Texas case #3:04-CV-1027-B (App. 1-14). The opinion of the United States Court of Appeals for the Fifth Circuit case #05-11206 filed 2-22-2007 (App. 15-18), Petition for Rehearing was denied on March 13th, 2007.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution amendments I, IV, VIII, XIV, and Due Process clause.

STATEMENT OF THE CASE

The plaintiff relies on his filed verified amended Complaint (trial court docket), (2) sworn affidavits of Daniel Montes, Jr., sworn affidavit of Elizabeth Hernandez Hudson, color photos, jail video tape, filed in his Plaintiff's Appendix in the trial court record. The defendants' sworn version of the facts contradict the plaintiff's version. Montes alleges physical retaliation by the defendants from his First Amendment right of free speech especially regarding reporting police misconduct. Montes alleges a physical assault by Jeffrey P. Ransom when he was already in handcuffs, Montes alleges that he gave verbal notice that the handcuffs were painfully overtight to Jeffrey P. Ransom, Demarquis F. Black, Willie Faye Washington & David Bonner (through the jail medical nurse) and Glen Garrison, but was ignored. Montes alleges that he requested verbally and in writing for medical care upon

Glen Garrison, Willie Faye Washington and David Bonner, but was denied. Ransom and Black under oath stated that they never heard Montes request for the handcuffs be adjusted contrary to Montes' version. Ransom and Black under oath stated that they never saw any injuries when Montes alleges that they never looked. Montes alleges a more than deminimus injury from Ransom's assault and from the defendants malicious use of excessively forceful overtight handcuffs over two and three quarter (2.75) hours. Montes incurred $1400 US Dollars in emergency medical care for his injuries. Montes alleges a permanent injury from a diminished capacity and continued pain in his hands, wrists, arms and shoulders to this day affecting his quality of life and livelyhood. (Plt's Appendix in Trial Record).

REASONS FOR GRANTING THE PETITION

One (1) federal question is presented and is of exceptional importance and is recurring. **Question One**, the panel in harmful error ignores Supreme Court precedence in *Hope* and *Graham*, in conflict with the First, Fourth, Eighth, Fourteenth Amendments and Due Process Clause, in conflict with other circuits as to excessive force claims of physical assault while in handcuffs and excessively forceful handcuffing with notice and ignored, denial of medical care and is recurring. The panel ignores the Supreme Court's precedence in *Hope v. Pelzer* that excessively forceful handcuffing with notice is clearly established and is actionable including for qualified immunity purposes. The plaintiff was arrested for a non-violent, no weapon, misdemeanor offense of trespass, and was at no time a threat to any person or himself, not attempting to escape, and was cooperating with the officers. Montes did give notice to the officers on the scene that he was to report their misconduct by filing a federal case against them. Ransom and Black became angry as to Montes free speech comments. Once Ransom placed his handcuffs on Montes, that Montes then noticing that the handcuffs were tight causing pain, did ask Ransom to adjust the handcuffs. Hudson witnessed this incident. Montes was already in

handcuffs, when Ransom in his angry state then maliciously retailiated by physically assaulted Montes by forcefully lifting Montes by the handcuffs to his toes causing excruciating pain and tightening the cuffs even more, clearly a physical assault of force that is unreasonable and unnecessary under the circumstances. Ransom then double locked the cuffs in the overtight position. Montes again plead with Ransom that the cuffs are really tight and causing great undue pain, but was maliciously ignored. Montes plead with Black, Willie Faye Washington and David Bonner through the jail medical nurse and with Glen Garrison. Montes did request verbally and in writing for medical care in the jail, but was denied. (Plt's App. in Trial Record). The panel in harmful error failed to take all the facts of this case, narrowly construed Montes' pro se amended verified complaint (trial court docket), Montes' two sworn affidavits, Hudson's affidavit, color photos and video tape (all filed in Plaintiff's Appendix, trial court record), and ignored the Supreme Court's precedence in *Hope* and *Graham* as to Montes' excessive force and remaining claims. The panel declared in harmful error that Montes did not suffer a more than deminimus injury to establish his excessive force claim. Montes did incurred over $1400 US Dollars in medical emergency costs the day he was released from the physical injuries he suffered at the hands of the defendants. Fourteen hundred dollars in emergency medical care does not describe a deminimus injury requiring a band-aid and aspirin. Montes was prescribed controlled medicine for over several weeks for the swelling & pain, wrist and arm braces were placed onto the plaintiff by the medical doctors to immobilize his wrists and arms to assist in healing. Montes asks this Court to remand the case on the medical evidence because a genuine issue of material fact exists as to the extent of Montes injuries, citing ***Santos.*** Montes injuries affect his quality of life, work and livelyhood as to this day, by his diminished ability to lift heavy objects as before and continued numbness in his hands, arms and shoulders to this very day. The panel is in harmful error first denied Montes' excessive force claim, then in a cascading effect denied each and every remaining claim based on the

first. If this Court remands on Montes' excessive force claim, then it should also remand Montes' remaining claims. Material fact issues are present and have been identified by the plaintiff precluding summary judgment. Excessive force claims do not require an allegation of an assault or injury, but in the Fifth Circuit a more than deminimus injury is required to sustain an excessive force claim regarding overtight handcuffs, where Montes pleads that this more than deminimus injury requirement is unconstitutional as in conflicting with the Constitutions of the US and Texas, in conflict with Supreme Court precedence in *Hope* and *Graham*, is vague, overbroad and prone to abuse. In the Sixth Circuit, the right to be free from "excessively forceful handcuffing" is a clearly established right, *Kostrzewa v. City of Troy*, 247 F.3d 633, 641 (6th Cir. 2001), and applying handcuffs so tightly that the detainee's hands become numb and turn blue certainly raises concerns of excessive force. Sixth Circuit precedents allow the plaintiff to get to a jury upon a showing that officers handcuffed the plaintiff excessively and unnecessarily tightly and ignored the plaintiff's pleas that the handcuffs were too tight. *See id. Martin v. Heideman*, 106 F.3d 1308, 1310, 1313 (6th Cir. 1997) (reversing directed verdict in favor of defendants on excessive force claim when plaintiff's hands were injured after thirty-five minutes in tight handcuffs). *Palmer v. Sanderson,* 9 F.3d 1433 (9th Cir. 1993), one of the earliest tight handcuffing cases, the plaintiff's complaints that the handcuffs were too tight and painful provided the officer with constructive notice that the force used might have been excessive under the circumstances. Despite this notice, the officer refused to loosen the handcuffs. *Id.* at 1436. The Court concluded that "[u]nder these circumstances no reasonable officer could believe that the abusive application of cuffs was constitutional." *Id.* Thereafter, a number of circuit courts employed this same analysis, again without discussing the principle of notice, and concluded that there were sufficient facts to state an excessive force claim where the plaintiff's complaints about painful and overly tight handcuffing were ignored by the arresting officers. *See Herzog v.*

Village of Winnetka, 309 F.3d 1041, 1043 (7th Cir. 2002) (concluding that summary judgment was improperly granted in favor of the officers where plaintiff was handcuffed for an hour despite complaints that the cuffs were too tight). *Kukla v. Hulm*, 310 F.3d 1046 (8th Cir. 2002); *Bastien v. Goddard*, 279 F.3d 10, 12-13 (1st Cir. 2002) (reversing judgment for officer based on tight handcuffing for more than four hours despite plaintiff's repeated complaints); *Kostrzewa v. City of Troy*, 247 F.3d 633, 639-40 (6th Cir. 2001) (officer documented that he had been able to tighten the cuffs to only the first tooth because the plaintiff had large wrists, yet he ignored plaintiff's persistent complaints that the cuffs were too small and tight until after the plaintiff was booked); *Heitschmidt City of Houston*, 161 F.3d 834, 839-40 (5th Cir. 1998) (reversing summary judgment for officers who ignored repeated complaints over a four-hour period and pointing out that the officers had no justification for refusing to adjust the painful cuffs) from the 5th Cir?!; *Martin v. Heideman*, 106 F.3d 1308, 1310, 1313 (6th Cir. 1997) (plaintiff's complaints that his hands were becoming numb and swollen and the officer's failure to adjust the handcuffs were sufficient to state a Fourth Amendment claim). *Alexander v. County of Los Angeles*, 64 F.3d 1315, 1322-23 (9th Cir. 1995) (reversing grant of summary judgment in favor of officers on qualified immunity and holding that fact issue existed as to whether officers used excessive force in refusing to loosen plaintiff's handcuffs). The Supreme Court has ruled depending on the totality of the circumstances regarding ignoring the pleas regarding overly tight handcuffs is an Eighth Amendment violation as to "unnecessary and wanton infliction of pain." *Hope*, 122 S. Ct. at 2514. Such actions *a fortiori* violate the Fourth Amendment, which requires a showing of objective unreasonableness rather than any particular subjective motivation. *See Graham v. Connor*, 490 U.S. 386, 398 (1989). The Fourth Amendment permits detention using only "the least intrusive means reasonably available." *United States v. Sanders*, 719 F.2d 882, 887

(6th Cir. 1983) (quotation omitted). "Claims of excessive force do not necessarily require allegations of assault," but rather can consist of the physical structure and conditions of the place of detention. The defendants' will cite circuit case law that is contradictory to the case law cited by Montes. This shows that a split exists between the circuits and is recurring as to the question presented by Montes justifying intervention and guidance by this Supreme Court. Montes' due process rights are being violated by the panel's harmful error by holding Montes to a higher standard of the law. The actions of the arresting officers and jailers toward Montes inflicting intentional unnecessary and wanton pain and mental anguish from the excessively forceful tight handcuffs with notice and then ignoring his pleas and the pleas of the jail medical nurse over 2.75 hours, denying him medical care, unreasonably declaring him a suicide risk and confining him to a cold solitary cell for 10 hours, are all clearly unreasonable and are constitutional violations under the totality of the circumstances, qualified immunity should also be denied to all defendants and the panel's ruling should be reversed and remanded in its entirety for jury trial.

CONCLUSION

For all of the reasons set forth above, this writ should be granted and the decision of the panel should be reversed and remanded in its entirety for jury trial.

Dated May 10th, 2007.

Respectfully submitted,

/s/ Daniel Montes, Jr.
Daniel Montes, Jr., petitioner pro se
2735 Hidden Meadow Dr.
Arlington, Texas 76006
817 – 642 – 0887 Home

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Respondents.

APPENDIX

FOR PETITIONER
Daniel Montes, Jr., petitioner pro se
2735 Hidden Meadow Dr.
Arlington, Texas 76006
817 – 642 – 0887 Home

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DANIEL MONTES, JR.,	§	
Plaintiff,	§	
v.	§	**CIVIL ACTION**
	§	**NO. 3: 04-CV-1027-B**
JEFFREY P. RANSOM,	§	
DEMARCUS F. BLACK,	§	
WILLIE FAE	§	
WASHINGTON, DAVID	§	
BONNER,	§	
Individually Defendants.	§	

MEMORANDUM ORDER

The following motions are before the Court: 1) Defendants Ransom and Black's Motion for Summary Judgment (docket no. 41), filed November 15, 2004; and 2) Dallas County Defendants' Motion for Summary Judgment (docket no. 39), filed November 15, 2004. After review of the pleadings and evidence, the Court GRANTS both motions and dismisses Plaintiff's state law claims without prejudice.

I. Background Facts

Around noon on November 9, 2002, Defendant Jeffery P. Ransom, an officer for the Dallas Police Department ("DPD"), and other DPD officers responded to a call for police assistance at a Dallas residence. (Def.'s App. in Supp. Ransom and Black's Mot. Summ. J. ["Defs.' App."] at 6). DPD Officer Demarquis Black later responded to provide cover assistance. (*Id.* at 1-2). When the officers arrived on the scene they saw a man, later identified as Plaintiff Daniel Montes ("Montes"), moving items out of the house and into the yard. (*Id.* at 2, 6, 10). Annie Laura Scott, the owner of the residence, explained to Ransom and Black that Montes had broken into her home, claiming that it his, and had changed the locks on the door. (*Id.* at 2, 6). Dallas County Constables were later called to the scene. (*Id.*). Chief Constable Derrick Evans explained to Montes that his actions did not not follow established legal procedures. (*Id.*)

1. Black's first name appears to be misstated as "Demarcus" in the caption.

Constable Evans later consulted with a justice of the peace who confirmed that Montes had no legal right to break into the victim's residence. (*Id.*). A Dallas Police Department Supervisor was also called to the scene. (*Id.* at 3, 7). The supervisor also attempted to explain to Montes that his actions were unlawful, but Montes persisted. (*Id.*). Eventually Scott decided to press charges against Montes, and he was placed under arrest and into handcuffs by Ransom. (*Id.* at 7). Montes says that he informed "all persons" at the arrest scene that he was going to include them in a federal lawsuit he intended to file, but it is unclear whether Montes made this declaration before or after he was handcuffed. (Pl.'s App. in Resp. Defs.' Mot. Summ. J. ["Pl.'s App."] at 15). Montes complains that the handcuffs were too tight on his wrists. (*Id.*). He says that he asked Ransom to adjust the handcuffs, but that Ransom ignored his request and instead made them even tighter. (*Id.*). Ransom and Black deny that the handcuffs were placed on Montes too tightly. (Defs.' App. at 3, 7). Black transported Montes to the Dallas County Jail. (Pl.'s App. at 11; Defs.' App. at 3). Montes claims that he repeatedly asked Black to loosen the handcuffs because he had lost feeling in both of his hands. (Pl.'s App. at 11-12). Black states that he never heard Montes complain about any injuries or pain and that he did not see that Montes had suffered any injuries to The Court will use the term "Defendants" throughout this order to collectively refer to all 3 Defendants. his wrists. (Defs.' App. at 3). Montes claims that once at the jail facility, Black continued to ignore his pleas to adjust the handcuffs, and that he and Black remained in the police car for agonizing minutes. (Pl.'s App. at 12). Black eventually transferred custody of Montes to Dallas County jailers. (Pl.'s App. at 12; Defs.' App. at 4). Montes complains that he remained in the over-tight handcuffs for the next two and-a-half hours. (Pl.'s App. at 12). When the handcuffs were finally removed, Montes contends that he requested medical attentiont for his now blue hands, but was refused. (*Id.*). He further states that upon his release from custody he went immediately to a hospital emergency room to treat his

2. Montes was later convicted of criminal trespass for his conduct on November 9, 2002. (Defs.' App. 2 at 4, 8).

injuries allegedly caused by the handcuffs. (*Id.*). Montes says that he still to this day experiences constant pain in his left arm, has lost feeling in both of his hands and arms, and constantly feels pain in both of his hands as a result of the handcuffs. (*Id.* at 12-13).

II. Procedural History

Montes, proceeding pro se, filed this lawsuit on May 12, 2004 against DPD Officers Ransom and Black and Dallas County Officers Willie Faye Washington and David Bonner concerning the events of November 9, 2002. Montes's September 1, 2004 Amended Complaint states causes of action against Defendants for excessive force, violations of equal protection rights, and conspiracy to violate civil and equal protection rights. He also brings state law claims for negligence, assault and battery, and intentional infliction of emotional distress. Defendants filed their respective motions for summary judgment on November 15, 2004, seeking summary judgment on all of Montes's claims. These motions are ripe for decision.

III. Analysis

A. Legal Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Only disputes about material facts will preclude the granting of summary judgment. *Id.* The burden is on the summary judgment movant to prove that no genuine issue of material fact exists. *Latimer v. Smithkline & French Lab.*, 919 F.2d 301, 303 (5th Cir. 1990). If the non-movant bears the burden of proof at trial, the summary judgment movant need not support its motion with evidence negating the non-movant's case. Rather, the movant may satisfy its burden by pointing to the absence of evidence to support the non-movant's case. *Id.*; *Little*, 37 F.3d at 1075. Once the movant has met its burden, the non-movant must show that summary judgement is not appropriate.

Little, 37 F.3d at 1075 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). "This burden is not satisfied with 'some metaphysical doubt as to material facts,' . . . by 'conclusory allegations,' . . . by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). The non-moving party must "come forward with 'specific facts showing that there is a *genuine issue for trial.*'" *Matsushita*, 475 U.S. at 587 (emphasis in original) (quoting FED. R. CIV. P. 56(e)). To determine whether a genuine issue exists for trial, the court must view all of the evidence in the light most favorable to the nonmovant, and the evidence must be sufficient such that a reasonable jury could return a verdict for the non-movant. *Munoz v. Orr*, 200 F.3d 291, 302 (5th Cir. 2000); *Anderson*, 477 U.S. at 248.

B. Excessive Force Claims Against Officers Ransom and Black

Montes asserts that Officers Ransom and Black used excessive force against him in connection with his arrest on November 9, 2002. As Montes sues Ransom and Black in their individual capacities only, they have recourse to the affirmative defense of qualified immunity. *Burns-Toole v. Byrne*, 11 F.3d 1270, 1273 (5th Cir. 1994). Qualified immunity shields government officials acting within their discretionary authority from liability when their conduct does not violate clearly established statutory or constitutional law of which a reasonable person would have known. *Wallace v. County of Comal*, 400 F.3d 284, 289 (5th Cir. 2005); *see also Estate of Davis v. City of North Richland Hills*, 406 F.3d 375, 380 (5th Cir. 2005) (stating that qualified immunity protects all but the plainly incompetent and those who knowingly violate the law). The qualified immunity analysis is a two-step inquiry. *Mace v. City of Palestine*, 333 F.3d 621, 623 (5th Cir. 2003). First, the Court must decide whether Montes's allegations, if taken as true, establish that the conduct of Ransom and Black violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Mace*, 333 F.3d at 623. If there is no constitutional violation, the inquiry ends. *Saucier*, 533 U.S. at 201. If, however, the allegations describe a constitutional violation, the Court

must decide whether the right was clearly established at the time - that is, whether it would be clear to a reasonable officer that his conduct was unlawful given the situation he confronted. *Mace*, 333 F.3d at 623-24; *see also Saucier*, 533 U.S. at 201. The Fourth Amendment to the United States Constitution guarantees citizens from unreasonable seizures. U.S. CONST. amend. IV. "Clearly established" law provides that the Fourth Amendment protects against the use of excessive force in effectuating an arrest. *Panthaky v. County of Dallas, Texas*, 2004 WL 246203, at *4 (N.D. Tex. Jan. 7, 2004) (citing *Graham v. Connor*, 490 U.S. 386, 394 (1989)). To prevail on his excessive force claim, Montes must prove "(1) an injury which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable." *Ikerd v. Blair*, 101 F.3d 430, 433-34 (5th Cir. 1996). The Fifth Circuit no Longer requires that a plaintiff show that an injury be "significant" to support a claim for excessive force. *Williams v. Bramer*, 180 F.3d 699, 703 (5th Cir. 1999) (noting that the plaintiff must suffer "some form of injury"); *see also Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2001). *De minimis* injuries, however, are not actionable. *Williams*, 180 F.3d at 703. Here, Ransom and Black contend that Montes's alleged Injuries are *de minimis,* and thus not actionable. Montes premises his excessive force claim against Ransom and Black entirely on his allegation that those officers placed him in overly tight handcuffs and refused to adjust them despite his repeated requests that they do so. He specifically charges that Ransom in fact tightened, rather than loosened, the handcuffs in response to his complaints (Pl.'s App. at 11) and that Black allowed him to sit too long in the handcuffs once at the county jail. (*Id.* at 12). Ransom and Black, for their part, contend that the handcuffs placed on Montes were not too tight and that they never heard Montes complain that the handcuffs were causing him pain or injuries. (Defs.' App. at 3, 7). The Court will assume for summary judgment purposes that the handcuffs placed on Montes were over-tight. Settled Fifth Circuit law provides, however, that "handcuffing

too tightly, without more, does not amount to excessive force." *Tarver v. City of Edna*, 410 F.3d 745, 752 (5th Cir. 2005) (quoting *Glen*, 242 F.3d at 314). But Montes complains not only about the tight handcuffing but also about the pain he allegedly suffered afterwards, and continues to suffer to this day. Both Montes and Ransom and Black attach to their summary judgment materials color photographs of Montes after he was released from the Dallas County jail. (Defs.' App. at 11-14; Pl.'s App. at 32). The photographs reveal that Montes's wrists had some minor red marks on them and appeared to be swollen. (*Id.*). Those harms, however, are of an inherently transient nature, and the Fifth Circuit has specifically found that contusions and swelling of the writs, alone, are but *de minimis* injuries. *Tarver*, 410 F.3d at 751-52; *Glen*, 242 F.3d at 314. Montes alleges more lasting injuries, however. He states in his affidavit that from the time of his arrest on November 9, 2002 through the present day he continues to feel constant pain in his left arm and has lost feeling in both hands, while at the same time feeling constant pain in both hands. (Pl.'s App. at 12-13). He also opines that he has lost 25 percent gripping strength in both hands. (*Id.* at 15). Montes further states that he is a construction worker, and since the handcuffing incident he has been unable to find work because of his inability to lift heavy objects. (*Id.*). He says that he continues to take pain medication for the incessant pain in his hands, wrists, and arms, and he "predicts to continue to visit nerve specialists for the rest of his life considering the injuries seem to be permanent." (*Id.*). Montes is not a medical expert, however, and he has proffered no expert testimony to attest to any permanent injury he suffered as a result of being handcuffed too tightly. In fact he offers no competent, objective summary judgment evidence supporting his claims of lasting injury caused by the events of November 9, 2002. Although he presents what appear to be medical bills and records in his summary judgment materials, those documents are unauthenticated and constitute

3. Montes's mother also states that Montes complains regularly about pain in his writs and hands and that he is unable to work the same types of jobs that he did before the handcuffing incident. (Pl.'s App. at 18).

hearsay. As such, they are not entitled to judicial recognition. *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994) (refusing to allow pro se litigant to rely on unauthenticated documents to defeat defendant's summary judgment motion); FED. R. EVID. 901. Several courts have held that a plaintiff's allegations of long-term or permanent injury, in the absence of corroborating medical or other objective evidence, are insufficient to support an excessive force claim. *Foster v. Metro. Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir. 1990) ("We do not believe . . . allegations of pain as a result of being handcuffed, without some evidence of more permanent injury, are sufficient to support claim of excessive force."); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001) (affirming grant of summary judgment on excessive force claim where plaintiff failed to provide medical records supporting her claim that she suffered injury from being handcuffed); *Panthaky*, 2004 WL 246203, at *4 (granting summary judgment in defendant's favor on excessive force claim where plaintiff produced no summary judgment-type evidence, other than his own affidavit, to support his allegations of physical and psychological injuries allegedly arising from, among other things, tight handcuffs); *Esmont v. City of New York*, 371 F.Supp. 2d 202, 215 (E.D. N.Y. 2005) ("Unsubstantiated claims of nerve damage, in the absence of corroborating medical evidence, are insufficient to support a claim of excessive force from handcuffing."); *Startzell v. Velie*, 2005 WL 1645802, at *7 (W.D. Wash. July 12, 2005) ("A plaintiff's allegations of injury are insufficient to support a claim of excessive force without substantiating medical records or some other objective evidence."); *Palmer v. Unified Gov't of Wyandotte County/Kansas City*, 72 F.Supp. 2d 1237, 1247-48 (D.Kan. 1999) (granting summary judgment to officer where the only evidence of injury from handcuffing was plaintiff's deposition testimony and record was otherwise devoid of corroborating

5. Montes offers as part of his summary judgment proof a videotape of the intake area of the Dallas County jail. (Pl.'s App. at 135). Although the picture is jumpy and vague, the video does not indicate that Montes exhibited any signs of discomfort from the handcuffs. (*Id.*).

evidence). And recently, the Fifth Circuit has cited approvingly of the Eighth Circuit's decision in *Crumley v. City of St. Paul*, 324 F.3d 1003, 1008 (8th Cir. 2003), which reaffirmed an earlier holding requiring a plaintiff to present medical evidence establishing some degree of permanent injury before allowing the application of handcuffs to give rise to an excessive force claim. *Tarver*, 410 F.3d at 752; *Foster*, 914 F.2d at 1082. Here, Montes has failed to provide competent objective evidence, medical or otherwise, showing that the injuries he suffered were anything other than *de minimis*. Nor has Montes shown that the force employed by Ransom and Black was "repugnant to the conscience of mankind." *Gomez v. Chandler*, 163 F.3d 921, 924 n.4 (5th Cir. 1999) (quoting *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997)). Here, Montes alleges that Defendants Ransom and Black acted maliciously in placing the handcuffs on him too tightly and by refusing to loosen them upon his request. He even asserts that Ransom tightened the handcuffs in response to one of his complaints that the handcuffs were too tight. Assuming the truth of Montes's allegations, the Court finds that while such actions by police officers may be reprehensible, they were not repugnant to the conscience of mankind. *Siglar*, 112 F.3d at 193 (concluding that plaintiff failed to raise valid excessive force claim where his injury – a sore, bruised ear – lasted for only three days even where the officer twisted plaintiff's hands and arms without provocation); *Ingram v. Miranda*, 2004 U.S. Dist. LEXIS 16238, at * 17-18 (N.D. Tex. Aug. 16, 2004) (granting summary judgment to trooper where plaintiff alleged that trooper used excessive force by improperly placing handcuffs on him by clamping them on his wrist bone and forcing handcuffs into plaintiff's skin and back, tearing the skin on both wrists); *Rader v. Lubbock County, Texas*, 2003 WL 21145788, at *12-13 (N.D. Tex. April 25, 2003) (granting officer's motion for summary judgment where officer allegedly intentionally tightened handcuff on plaintiff and left the handcuff on for three or four hours); *Serrano v. Correctional Officer Addy*, 2004 U.S. Dist. LEXIS

5195, at *14 (N.D. Tex. March 31, 2004) (dismissing *Bivens* excessive force claim where Defendants deliberately ignored plaintiff's complaints about overly tight handcuffs and tightened them even more when plaintiff complained). In short, Montes has failed to come forward with sufficient evidence to support his claim that Ransom and Black violated his constitutional right to be free from excessive force. Those officers are accordingly entitled to summary judgment in their favor on Montes's excessive force claim.

C. Excessive Force Claims Against Officers Washington and Bonner

Montes offers scant evidence in support of his § 1983 excessive force claims against Dallas County Officers Washington and Bonner. Montes's claims against those officers apparently stem solely from the fact that, on November 9, 2002, Washington was the supervising officer for the prisoner intake area at the Dallas County Jail from 6 a.m. until 2:30 p.m, and Bonner was the supervising officer on duty from 2:00 p.m. until 10:30 p.m. (Pl.'s App. at 15-16). Montes complains that Dallas County jailers failed to adjust or remove his handcuffs during his time at the jail facility. He specifically alleges that a jailer walked by and inquired of an unidentified "supervisor": "why is this prisoner still in handcuffs?". (*Id.* at 12). The Court will not consider this statement as it is plainly hearsay and fails to identify the "supervisor" to whom the statement was allegedly made. Nor will the Court consider Montes's allegation that the duty nurse "inquired with the on-staff sergeant supervisor regarding the handcuffs, but the handcuffs remained." (*Id.*). Again, this statement is incompetent summary judgment evidence because it is hearsay and fails to identify the "sergeant supervisor" to whom it was allegedly made. Montes simply offers no evidence showing that Defendants Washington and Bonner were directly involved in any way with Montes's handcuffing, or in unnecessarily protracting the amount of time he remained handcuffed while at the Dallas County jail. The law is settled that supervisory officials cannot be held vicariously liable for the actions of subordinates under § 1983 unless they "(1) affirmatively participate in acts that cause constitutional deprivation, or (2) implement

unconstitutional policies that causally result in plaintiff's injury." *Parks v. County*, 2001 WL 1143275, at *3 (N.D. Tex. Sept. 18, 2001) (citing *Thompkins v. Belt*, 828 F.2d 298, 303 (5th Cir. 1987)). Montes admits that Washington and Bonner cannot be held responsible for implementing an unconstitutional policy. (Pl.'s Resp. at 15). And he has put forward no competent summary judgment evidence showing that either Washington or Bonner affirmatively participated in the acts of which he complains or were deliberately indifferent to his rights. Consequently, Washington and Bonner are entitled to summary judgment in their favor on Montes's excessive force claim under § 1983.

D. Montes's Conspiracy Claims Under 42 U.S.C. § 1985

Montes alleges that Defendants conspired to interfere with his civil rights in violation of 42 U.S.C. § 1985 (2) and (3). Subsection (2) prohibits conspiracies to hinder judicial proceedings, *e.g.* by deterring through force or intimidation parties or witnesses from attending or testifying in court or by obstructing the course of justice with the intent to deny equal protection of the laws. 42 U.S.C. § 1985 (2); *Garrison v. City of Texarkana, Texas*, 910 F.Supp. 1196, 1205 (E.D. Tex. 1995). Montes's claim appears to be based on his charge that Defendants Ransom and Black became angry when he announced to everyone at the arrest scene that he was going to include them in a federal lawsuit and that they retaliated against him accordingly by fixing the handcuffs too tight. (Pl.'s Resp. at 25). This claim is frivolous. Even assuming that Ransom and Black did apply Montes's handcuffs too tightly, they did not in any way impede Montes from bringing a lawsuit to vindicate any rights that he perceived were violated. Montes's mere threat to file a lawsuit did not insulate him from being lawfully arrested for a crime for which he was ultimately convicted. (Defs.' App. at 4). Defendants are therefore entitled to summary judgment on Montes's claims under 42 U.S.C. § 1985 (2). Montes also brings a claim under 42 U.S.C. § 1985 (3), arguing that Defendants conspired to keep him in overly tight handcuffs for approximately three hours to punish him for being Hispanic. To prevail on a

claim under 42 U.S.C. § 1985 (3), Montes must prove: (1) that the defendants conspired (2) for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) one or more of the conspirators committed some act in furtherance of the conspiracy; whereby (4) another is injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States; and (5) the action of the conspirators is motivated by a racial animus. *See Wong v. Stripling*, 881 F.2d 200, 202 (5th Cir. 1989). He must also show some class-based animus. *Burns-Toole v. Byrne*, 11 F.3d 1270, 1276 (5th Cir. 1994). Montes offers nothing but conclusory allegations in his response to Defendants' motions for summary judgment on his § 1985 (3) conspiracy claim. He simply says that "[t]here were true racial tensions in the air at the arrest scene" and that "plaintiff is hispanic and the defendants and [Scott] are black." (Pl.'s Resp. at 25). Montes's conclusory allegations are insufficient to support a claim for relief under 42 U.S.C. § 1985 (3). Defendants are therefore entitled to summary judgment on that claim. The Court construes Montes's claim for "mental anguish, emotional distress, and pain and suffering" as stating an intentional infliction of emotional distress claim.

E. Equal Protection Claims

Montes asserts in his summary judgment response that he has "combined" his equal protection claim with his claim under 42 U.S.C. § 1981. To prove either an equal protection violation or a claim under § 1981, a plaintiff must show purposeful discrimination. *Johnson v. Rodriquez*, 110 F.3d 299, 306 (5th Cir. 1997) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 292-93 (1987)); *Bluitt v. Houston Indep. Sch. Dist.*, 236 F.Supp. 2d 703, 719 (S.D. Tex. 2002). "The essence of an equal protection claim is that other persons similarly situated as is the claimant unfairly enjoy benefits that he does not or escape burdens to which he is subjected." *Sammad v. City of Dallas*, 940 F.2d 925, 941 (5th Cir. 1991) (quoting *United States v. Cronn*, 717 F.2d 164, 169 (5th Cir. 1983)). Here, Montes merely alleges in his complaint that he was denied equal protection by being placed in tight

handcuffs (Compl. ¶¶ 22, 23), and he has failed to adduce any evidence in response to Defendants' motions for summary judgment tending to show that Defendants treated him any differently than others similarly situated or purposefully discriminated against him. Defendants are thus entitled to summary judgment on Montes's equal protection claims.

F. State Law Claims

Having dismissed Montes's federal causes of action, only his state law claims for negligence, assault and battery, and intentional infliction of emotional distress remain. The Court dismisses those supplemental claims without prejudice pursuant to 28 U.S.C. § 1367(c)(3). *See Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 876 (5th Cir. 2000).

IV. Conclusion

For the foregoing reasons, the Court GRANTS the summary judgment motions of Defendants Ransom and Black and Defendants Washington and Bonner. The federal causes of action asserted by Montes in this lawsuit are accordingly DISMISSED with prejudice. Montes's state law claims are DISMISSED without Prejudice under 28 U.S.C. § 1367 (c)(3).

SO ORDERED.

SIGNED July 27 , 2005 th

/s/ JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

FILED
February 22, 2007
Charles R. Fulbruge III Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-11206
Summary Calendar

DANIEL MONTES, JR.
Plaintiff-Appellant,
Versus
JEFFERY P. RANSOM, # 6952; DEMARCUS F. BLACK, # 7574; WILLIE FAYE WASHINGTON; DAVID BONNER,
Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas
USDC No. 3:04-CV-1027

Before REAVLEY, GARZA and BENAVIDES, Circuit Judges.

PER CURIAM: *

Daniel Montes, Jr. appeals from the district court's grant of motions for summary judgment in favor of police officers and prison officials and dismissal of his federal and state claims. Montes argues that defendants Jeffery P. Ransom and Demarcus Black, who were arresting officers, used excessive force when they handcuffed him too tightly. He argues that defendants Willie Faye Washington and David Bonner, officials at the jail while he was held in custody prior to his release, failed to loosen his handcuffs. He argues, inter alia, that the district court misapplied the law of this circuit when it dismissed his claims. Handcuffing too tightly, without more, does not amount to excessive force. See Tarver v. City of Edna, 410 F.3d 745, 752 (5th Cir. 2005); Glenn v. City of Tyler, 242 F.3d 307, 314 (5th Cir. 2001). Moreover, admissible medical evidence establishing some injury is required to satisfy the injury requirement of an excessive force claim

based on the application of handcuffs. See Tarver 410 F.3d at 752 (citing, approvingly, Crumley v. City of St. Paul, 324 F.3d 1003, 1008 (8th Cir. 2003)); Clark v. America's Favorite Chicken Co., 110 F.3d 295, 297 (5th Cir. 1997). As the district court observed, photographs that Montes submitted do not reveal anything other than minor red marks and perhaps a small amount of swelling. Such minor injuries are inherently transient, are only de minimis, and are not actionable. See Tarver, 410 F.3d at 751-52; Glenn, 242 F.3d at 314. Regarding Montes's complaints of permanent injury, Montes's argument fails to establish error in the district court's evidentiary ruling, which is in accord with this circuit's precedent establishing that unauthenticated documents are not competent summary judgment evidence. See King v. Dogan, 31 F.3d 344, 346 (5th Cir. 1994); Haynes v. Pennzoil Co., 141 F.3d 1163 (5th Cir. 1998). The district court therefore did not err in dismissing Montes's claims of excessive force. To the extent that Montes is asserting that Washington and Bonner violated his constitutional rights by delaying or denying medical care, Montes's failure to establish "serious medical needs" that were overlooked or denied, or "substantial harm," defeats his claim that Washington and Bonner's actions constituted an Eighth Amendment violation. See Easter v. Powell, 457 F.3d 459, 462-65 (5th Cir. 2006). To the extent that Montes is asserting that Washington and Bonner are liable in a supervisory capacity, a supervisor cannot be liable under § 1983, where, as here, there is no underlying constitutional violation. See Rios v. City of Del Rio, Tex., 444 F.3d 417, 425-26 (5th Cir. 2006). Montes also argues that the fact that he was handcuffed in an inappropriate manner and forced to remain in handcuffs while he was in custody violated equal protection. The district court concluded that Montes failed to adduce any evidence that tended to show that the defendants treated him any differently than others who were similarly situated or that the defendants purposefully discriminated against him. Despite the district court's ruling, Montes's argument before this court consists only of conclusional assertions that the officials were

black, he is Hispanic, and an unnamed black judge with whom Montes has previously had difficulty was involved in his arrest. Blue brief, 22-23. Such conclusional allegations are insufficient to defeat a summary judgment motion. See Hugh Symons Group v. Motorola, Inc., 292 F.3d 466, 468 (5th Cir. 2002). Montes also contends that the district court should have analyzed his claim of conspiracy to violate his civil and equal protection rights under the First Amendment and Due Process clause. Unlike in his argument before this court, Montes's allegations of a conspiracy resulting from the law enforcement officials's reaction to his threat of lawsuit were tied to causes of action under 42 U.S.C. § 1985 (2) and (3). Therefore, the district court analyzed Montes's claims under § 1985 (2) and (3). Montes fails to argue that the district court erred with respect to his claims of conspiracy under § 1985 (2) and § 1985 (3). He therefore has abandoned these issues. See Grant v. Cuellar, 59 F.3d 523, 524 (5th Cir. 1995); Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987). Regarding Montes's argument that the district court erred by failing to consider whether the officers's response to his lawsuit threat violated his rights under the First Amendment, Due Process Clause, Fourth, Eighth, and Fourteenth Amendments, Montes did not present this argument to the district court. This court will not consider arguments that were not presented to the district court. See Little v. Liquid Air Corp., 37 F.3d 1069, 1071 n.1 (5th Cir. 1994) (en banc). Montes argues that the district court erred when it dismissed his state law claims. As the district court did not err in its dismissal of Montes's federal claims, the district court did not abuse its discretion under 28 U.S.C. § 1367 (c) (3) when it dismissed Montes's state law claims. See Priester v. Lowndes County, 354 F.3d 414, 425 (5th Cir. 2004). Montes also argues that the district court abused its discretion by failing to allow him to amend his complaint to add a defendant. Montes fails to explain why the district court's denial of his motion to file an amended complaint amounted to an abuse of discretion when Montes sought to file an "unnamed defendant" after he had previously been given leave

on one prior occasion to file an amended complaint, after he had filed an amended complaint, and after responsive pleadings were filed. He also sought to file the amended complaint after the deadline established in the district court's scheduling order for filing motions requesting joinder of additional parties or amendments of pleadings. Moreover, Montes did not subsequently identify in the district court the party who he sought to add as a defendant. Even if the district court abused its discretion in denying Montes's motion for leave to amend his pleadings, a remand to the district court to consider the merits of Montes's claim against the unnamed defendant would be a waste of judicial resources. See Halbert v. City of Sherman, Tex., 33 F.3d 526, 530 (5th Cir. 1994). Finally, Montes raises a recusal argument for the first time on appeal. As Montes's assertions do not establish good cause for why he did not file an affidavit requesting recusal of the trial judge, nor do his assertions show exceptional circumstances why this court should consider these issues for the first time on appeal, this court should decline to consider the argument. See Clay v. Allen, 242 F.3d 679, 681 (5th Cir. 2001). For the foregoing reasons the judgment of the district court is AFFIRMED.

*Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

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No. 07-10

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

DANIEL MONTES, JR.,

Petitioner,

v.

JEFFEREY P. RANSOM, #6952; DEMARQUIS F. BLACK, #7574; WILLIE FAYE WASHINGTON; and DAVID BONNER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES B. PINSON
Assistant City Attorney
Counsel of Record
CITY ATTORNEY'S OFFICE
1500 Marilla Street,
Room 7B North
Dallas, Texas 75201
214-670-3519 (voice)
214-670-0622 (facsimile)

Counsel for Respondents Jefferey P. Ransom and Demarquis F. Black

DOLENA T. WESTERGARD
Assistant District Attorney
FEDERAL SECTION
133 North Industrial
Boulevard, LB 19
Dallas, Texas 75207-4399
214-653-3692 (voice)
214-653-2899 (facsimile)

Counsel for Respondents Willie Faye Washington and David Bonner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESPONSE TO PETITIONER'S QUESTION PRESENTED FOR REVIEW

The Question Presented by Petitioner does not accurately reflect the issue in this case. Specifically, Petitioner overstates the issue in hopes of creating some reason for this Court to grant review. All Respondents were entitled to summary judgment on Petitioner's tight-handcuffing excessive force claim for various reasons, including Petitioner's failure to present competent, admissible summary judgment evidence that he had suffered an injury.

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OPINIONS BELOW

1. The district court held that allegations of injury from allegedly "over-tight handcuffing" are insufficient to support an excessive force claim if they are not corroborated by medical or other objective evidence. Pet. App. at 6a-7a, Slip op. at 8-9. The court concluded that Montes had come forward with no admissible, competent summary judgment evidence of an injury to support an excessive force claim, and no summary judgment evidence of any affirmative personal participation or deliberate indifference by the County Jail Supervisors to support his claim that they unnecessarily protracted the time he remained handcuffed. *Id.* at 7a-10a, Slip op. at 8-11.

2. The Fifth Circuit held that handcuffing too tightly, without more, does not amount to excessive force. *Id.* at 13a, Slip op. at 1. The court also upheld the district court's ruling that unauthenticated documents are not sufficient to establish injury from an alleged use of excessive force. *Id.* at 14a, Slip op. at 2. The court also concluded that there was no error in the district court's ruling that the County Jail Supervisors were not liable when there was no underlying constitutional violation, that is, no underlying claim for excessive force by a subordinate County Jail employee for whom the Supervisors were responsible. *Id.*, Slip op. at 3.

JURISDICTION

The district court had jurisdiction over this civil action pursuant to 28 U.S.C. §§ 1331 and 1343. The Circuit Court had jurisdiction over this action pursuant to 28 U.S.C. § 1291. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Factual Background

On November 9, 2002, Dallas police officers, including Jefferey P. Ransom and Demarquis F. Black, responded to a call for police assistance at a residence in Dallas. When Ransom and Black arrived, they saw Daniel Montes, Jr. moving items out of the house into the yard. Annie Laura Scott, the owner of the property, reported that Montes had broken into the house, claiming it was legally his, and had changed the locks on the door.

In their efforts to make sense of this unusual situation, Ransom and Black consulted with and relied on determinations by several persons, including the Chief Constable of Dallas County, a justice of the peace, and a Dallas police sergeant, who were more familiar than they were with the laws and procedures governing evictions. It was determined that Montes's efforts to oust Ms. Scott were clearly illegal, and various persons tried to persuade Montes to relent. When it became clear that Montes would not stop his illegal eviction, Ms. Scott was asked if

she wanted to press charges against him for criminal trespass. When she said she did, Ransom arrested and handcuffed Montes. Once he was under arrest, Montes began telling everyone he was going to sue them. Montes tried to bargain with Black by saying things like, "If you let me go right now, I won't include you in my lawsuit." Black drove Montes to the Dallas County Jail, where he transferred custody of Montes to Dallas County jailers.

II. Proceedings in the District Court

Montes, proceeding pro se as he has throughout this litigation, filed suit against Ransom and Black ("the City Police Officers") and Dallas County Sheriff's Officers Willie Faye Washington and David Bonner ("the County Jail Supervisors"). (Docket entry 1.) Answers were filed on behalf of the City Police Officers (docket entry 7) and on behalf of the County Jail Supervisors (docket entry 15). Both the City Police Officers and the County Jail Supervisors asserted qualified immunity as a defense to all federal claims. (Docket entries 7 and 15.)

Montes filed an amended complaint, with leave of the district court. (Docket entries 22 and 23.) All the defendants asserted qualified immunity in the answers filed in response to that amended complaint. (Docket entries 32 and 33.) In his amended complaint, Montes brought claims under 42 U.S.C. §§ 1981, 1983, and 1985, as well as claims under federal criminal law, 18 U.S.C. §§ 241 and 242. Montes asserted

claims for use of excessive force, a violation of equal protection rights, and conspiracy to violate civil and equal protection rights, and he premised those claims on alleged violations of the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution. Pet. App. at 3a, Slip op. at 3. Montes also asserted pendent state-law claims for negligence, assault and battery, and intentional infliction of emotional distress.

The City Police Officers filed a motion for summary judgment, as did the County Jail Supervisors. (Docket entries 39, 43.) All the defendants asserted the defense of qualified immunity in their motions for summary judgment. Montes filed a response and an appendix containing, among other things, his own affidavits and an affidavit of his mother, Elizabeth Hernandez Hudson; discovery responses by the City Police Officers; photographs allegedly showing his injuries from the incident; and unauthenticated medical injury reports and medical bills. (Docket entries 50, 51.)

The district court granted both motions for summary judgment and rendered judgment that Montes take nothing by his federal claims and dismissed without prejudice his pendent state-law claims. (Docket entries 101-102.) In its memorandum opinion, the district court held that allegations of injury from over-tight handcuffing are insufficient to support an excessive force claim if they are not corroborated by medical or other objective evidence. *Id.* at 7a-8a, Slip op. at 8-9 (citing *Tarver v. City of Edna*, 410 F.3d 745, 752 (5th Cir. 2005); *Crumley v. City of*

St. Paul, 324 F.3d 1003, 1008 (8th Cir. 2003); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001); *Foster v. Metro. Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir. 1990)). The court also held that maliciously applying handcuffs too tightly, refusing to loosen them, and tightening them further in response to a complaint that the handcuffs are too tight constitute conduct that may be reprehensible but that is not repugnant to the "conscience of mankind." *Id.* at 8a, Slip op. at 9 (citing *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997)).

The court concluded that Montes had come forward with no summary judgment evidence of any affirmative personal participation or deliberate indifference by County Jail Supervisors to support his claim that they unnecessarily protracted the time he remained handcuffed. *Id.* at 9a-10a, Slip op. at 11.

The court held the 42 U.S.C. § 1985(2) claim that the City Police Officers retaliated against Montes by tightening his handcuffs because he threatened to sue them was frivolous. The court further concluded Montes offered nothing but conclusory allegations to support his conspiracy claim under 42 U.S.C. § 1985(3) and failed to adduce any evidence that Defendants treated him differently than others similarly situated or purposefully discriminated against him. *Id.* at 10a-12a, Slip op. at 12-13. Finally, the court dismissed Montes's supplemental state law claims pursuant to 28 U.S.C. § 1367(c)(3). *Id.* at 12a, Slip op. at 13. Finding no constitutional violation by any of the defendants, the district court did not address the question of the defendants' right to

qualified immunity had there been any evidence of any such violation.

III. Proceedings in the Fifth Circuit Court of Appeals

In the Fifth Circuit, Montes asserted three issues: (1) whether the district court abused its discretion in dismissing his excessive force claims against all the defendants; (2) whether the district court abused its discretion in not allowing him to add additional defendants; and (3) whether the district court abused its discretion in not granting his motion for recusal. A panel of the Fifth Circuit affirmed the district court's judgment in an unpublished per curiam decision. Pet. App. at 7a-16a.

As to the excessive force issue, the Fifth Circuit held that handcuffing too tightly, without more, does not amount to excessive force. *Id.* at 13a, Slip op. at 1 (citing *Tarver v. City of Edna*, 410 F.3d 745, 752 (5th Cir. 2005); *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2005)). The court also upheld the district court's ruling that unauthenticated documents are not sufficient to establish injury from an alleged use of excessive force. *Id.* at 14a, Slip op. at 2 (citing *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994); *Haynes v. Pennzoil Co.*, 141 F.3d 1163 (5th Cir. 1998)). Next, the Fifth Circuit concluded that there was no error in the finding that the County Jail Supervisors were not liable when there was no underlying constitutional violation, that is, no underlying claim for excessive force by a subordinate County Jail employee for

whom the Supervisors were responsible. *Id.*, Slip op. at 3. The Fifth Circuit further held that Montes's equal protection claim could not withstand summary judgment scrutiny because it was based on only conclusional allegations that all four defendants are black, Montes is Hispanic, and an unnamed black judge with whom Montes had previously had difficulty was involved in his arrest. *Id.* at 14a-15a, Slip op. at 3.

As to the conspiracy claims asserted under Section 1985, the court upheld the finding that conclusional allegations are insufficient to defeat a summary judgment motion, as well as that Montes had abandoned his claims under Sections 1985(2) and (3). *Id.* at 15a, Slip op. at 3-4. The court rejected Montes's argument that the district court abused its discretion in not allowing Montes to add additional defendants, and also rejected his recusal argument, because both issues were raised for the first time on appeal. *Id.* at 15a-16a, Slip op. at 5-6.

SUMMARY OF THE ARGUMENT

This Court should deny Montes's petition for a writ of certiorari. The Fifth Circuit properly held that handcuffing too tightly, without more, does not amount to excessive force, and that admissible medical evidence establishing some injury is required to satisfy the injury requirement of a tight-handcuffing excessive force claim. The photographs Montes offered showed at most only inherently transient, minor red marks and perhaps a small amount of swelling, Resp. App. at 1 (from R. [separate folder]:32), and his

unauthenticated medical records were not competent summary judgment evidence of injury. The Fifth Circuit also correctly held that the County Jail Supervisors could not be liable in a supervisory capacity where, as here, there was no underlying constitutional violation.

In addition, Montes has neither demonstrated a split in the circuits nor has he demonstrated that the Fifth Circuit has articulated and applied an improper standard in Fourth Amendment excessive force cases involving over-tight handcuffing. Montes's petition simply does not set forth sufficient grounds or compelling reasons to grant a writ of certiorari. If accepted for review, the case would involve matters applicable and relevant only to the parties in this case. Accordingly, Montes's petition should be denied.

REASONS FOR DENYING THE PETITION

I. Montes Has Failed to Establish Sufficient Grounds for Certiorari under the Supreme Court's Rules.

Montes's petition for a writ of certiorari should be denied because Montes has not asserted sufficient grounds to justify review by this Court. Supreme Court Rule 10 states that this Court will grant a writ of certiorari "only for compelling reasons." Montes argues that there is a circuit split about whether more than a *de minimis* injury is required to sustain a tight-handcuffing excessive force claim, but given

that he failed to present competent evidence of *any* injury suffered as a result of the alleged too-tight handcuffing, this case is not an appropriate vehicle for consideration of that issue.

Montes also argues that the Fifth Circuit's decision conflicts with this Court's decisions in *Hope v. Pelzer*, 536 U.S. 730 (2002), and *Graham v. Connor*, 490 U.S. 386 (1989), but the legal basis for this argument is not at all clear from Montes's petition. *Hope*, 536 U.S. at 733-35, involved an Eighth Amendment excessive force claim brought by a convicted prisoner. This Court clarified in *Graham*, 490 U.S. at 394, that such a claim should be analyzed under a different standard than a claim relating to an arrest or investigatory stop of a free citizen such as Montes. In *Graham*, *id.* at 395, this Court held that all claims of excessive force in the course of a "seizure" of a free citizen should be analyzed under the standard of Fourth Amendment objective reasonableness rather than substantive due process. This Court directed that the reasonableness of a particular use of force must be considered "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396 (citing *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968)). And this Court noted that "[w]ith respect to a claim of excessive force, the same standard of reasonableness at the moment applies: 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment." *Id.* (citation omitted) (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d

Cir. 1973)). There is no conflict between the Fifth Circuit's decision in this case and the principles articulated in *Graham*.

This case presents none of the bases for review suggested in Rule 10, nor does it present any other compelling reason to grant review. The Court should "be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923).

II. The Fifth Circuit Correctly Held that Handcuffing Too Tightly, Without More, Does Not Amount to Excessive Force.

The Fifth Circuit correctly held that handcuffing too tightly, without more, does not amount to excessive force, and that admissible medical evidence establishing some injury is required to satisfy the injury requirement of a tight-handcuffing excessive force claim. Pet. App. at 14a, Slip op. at 2. Photographs that Montes had taken of his wrists after he was released from the Dallas County jail, *see* Resp. App. at 1, did not show he had sustained more than minor red marks and maybe some swelling on his wrists. The district court correctly concluded that those manifestations are "inherently transient." Pet. App.

at 6a, Slip op. at 7. The district court also correctly noted that Montes's proffered videotape apparently showing him being processed at the Dallas County jail (R. [separate folder]:135) does not show he was suffering any discomfort from the handcuffs. *Id.* at 7a, Slip op. at 9 n.5. Montes opined in an affidavit that since the arrest (1) he suffers constant pain in his left arm and suffers both constant pain and lost feeling in both hands, (2) he has lost 25 percent gripping strength in both hands, (3) he has been unable to find work as a construction worker because of his inability to lift heavy objects, (4) he continues to take pain medication for the incessant pain in his hands, wrists and arms, and (5) he "predicts to continue to visit nerve specialists for the rest of his life considering the injuries seem to be permanent." (R. [separate folder]:12-13, 15.) The district court correctly disregarded these opinions because Montes is not a medical expert and he proffered no expert testimony to show any permanent injury. Pet. App. at 6a, Slip op. at 7; *see* Fed. R. Evid. 702. Montes also presented what appear to be medical bills and records, which the district court correctly refused to recognize because they were unauthenticated hearsay. *Id.* at 6a-7a, Slip op. at 8. The Fifth Circuit concluded that Montes had established no error in the district court's evidentiary ruling and held that unauthenticated documents are not competent summary judgment evidence. *Id.* at 14a, Slip op. at 2. That conclusion was correct and does not present an issue for review.

III. This Case Does Not Involve a Split of Authority Among the Circuits.

The Fifth Circuit's decision is consistent with other circuit court holdings that allegations of injury from over-tight handcuffing are insufficient to support an excessive force claim if they are not corroborated by medical or other objective evidence. *Id.* at 7a-8a, Slip op. at 8-9 (citing *Crumley v. City of St. Paul*, 324 F.3d 1003, 1008 (8th Cir. 2003); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001); *Foster v. Metro. Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir. 1990)). In *Crumley v. City of St. Paul*, 324 F.3d at 1008, the plaintiff alleged that her handcuffs were secured so tightly they made one of her hands bleed. Nonetheless, the Eighth Circuit reaffirmed, *id.*, its holding in *Foster v. Metropolitan Airports Commission*, 914 F.2d 1076, 1082 (8th Cir. 1990) (involving a claim of nerve damage to the arms), that a claim of injury from being handcuffed is insufficient to support an excessive force claim in the absence of medical evidence of a "long-term injury" resulting from the handcuffing. In *Arpin v. Santa Clara Valley Transportation Agency*, 261 F.3d 912, the Ninth Circuit affirmed summary judgment on a Fourth Amendment excessive force claim where the plaintiff failed to provide medical records showing she suffered an injury from being handcuffed, *id.* at 921, even though during the handcuffing her left arm was allegedly twisted "with enough force to lift her off the ground and break her watch band," *id.* at 918.

IV. The Fifth Circuit's Judgment Was Correct Because all the Defendants Were Entitled to Judgment as a Matter of Law.

Even if Montes had established an injury by admissible, competent summary judgment evidence, all the defendants still were entitled to judgment as a matter of law. The City Police Officers established by uncontroverted summary judgment evidence that their conduct was objectively reasonable even if Montes suffered an injury. The County Jail Supervisors were entitled to judgment as a matter of law because Montes failed to present any evidence that they were directly involved in any way with Montes's handcuffing or that they unnecessarily protracted the time he remained in handcuffs at the jail and because Montes likewise failed to establish conduct by the Supervisors that would overcome their right to qualified immunity.

A. The City Police Officers Were Entitled to Summary Judgment on Alternative Grounds.

The City Police Officers were entitled to summary judgment on alternative qualified immunity grounds presented in their motion, but not reached by the district court or the Fifth Circuit. Qualified immunity's first reasonableness inquiry should be resolved in favor of the City Police Officers if they could have made a reasonable mistake of fact. *Saucier v. Katz*, 533 U.S. 194, 205 (2001). Assuming for

summary judgment purposes that Montes suffered an injury as a result of being handcuffed too tightly, the City Police Officers are entitled to qualified immunity because they did not see any injuries on his wrists (R. 2:239, 243) and so could have reasonably, albeit mistakenly, believed Montes was not injured. While Montes's wrists could have become swollen at some point after he was handcuffed (which the City Police Officers deny), there was no evidence that they were swollen, or that Ransom or Black observed them to be swollen, while Montes was in the City Police Officers' custody.

A reasonable police officer could easily accidentally handcuff a person too tightly. A reasonable police officer could also fail to adjust handcuffs if the officer mistakenly believes the handcuffs are not too tight. A reasonable police officer could even mistakenly determine that handcuffs need to be tightened further, even when they are already tight enough. And a reasonable police officer need not credit an arrestee's inevitable complaint that his handcuffs are too tight, in the absence of visible signs or other corroborating evidence of injury. *See Rodriguez v. Farrell*, 294 F.3d 1276, 1278 (11th Cir. 2002) (opinion on denial of reh'g) (noting, in a handcuffing excessive force case, that "a police officer need not credit everything a suspect tells him," especially "when the officer is in the process of handcuffing a suspect"). From the perspective of a reasonable officer, it would not have

been unusual for Montes to request that his handcuffs be adjusted or loosened. Handcuffs, by their very nature, are restrictive, uncomfortable, and unfamiliar to most individuals. And a criminal suspect has obvious motives behind a complaint of overtight handcuffs: loose handcuffs provide an avenue for escape, which will create a volatile situation that may seriously threaten the safety of the arresting officer and others. It is obvious that a prudent arresting officer will be wary of the obvious dangers of loosening handcuffs merely because an arrestee complains of discomfort or pain.

That the City Police Officers did not see any injury to Montes's wrists is especially significant to Montes's alleged nerve injury. Regardless of whether Montes complained that his handcuffs were too tight, a reasonable police officer in the City Police Officers' place could have easily believed that the absence of red marks, abrasions, swelling, or any other physical manifestation of injury to Montes's wrists indicated that no injury was in fact occurring. (*See* R. 2:239 (Black did not see any injuries), 243 (Ransom did not see any injuries); R. [separate folder]:32 (Montes's proffered photographs).) In the highly unlikely event that Montes received a nerve injury from handcuffs that were not tight-enough to leave a noticeable mark on his wrists, then the uncontroverted summary-judgment record established that the City Police Officers were reasonably mistaken about the facts governing the situation they confronted.

B. The County Jail Supervisors Were Entitled to Summary Judgment on Alternative Grounds.

The district court concluded that there was no basis for liability against the County Jail Supervisors because there was no underlying constitutional violation. Pet. App. at 4a-9a, Slip op. at 5-11. Even if the district court had concluded otherwise, the Supervisors were still entitled to summary judgment. They were entitled to summary judgment because, as the district court also correctly concluded, there was an absence of evidence in the record that either of the Supervisors personally participated in or were even aware that Montes was being held in the jail, let alone held in "over-tight" handcuffs. *Id.* at 9a-10a, Slip op. at 10-11. Montes's admission in the district court that he held the Supervisors liable solely because they were supervisors precluded the imposition of Section 1983 liability against either of them.

There is no split between the circuits or conflict with this Court on the legal principle that individuals may be held liable under Section 1983 based only on their own conduct. *Serna v. Colo. Dep't of Corr.*, 455 F.3d 1146, 1151 (10th Cir. 2006); *Patterson v. County of Oneida*, 375 F.3d 206, 229 (2d Cir. 2004); *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003); *Camilo-Robles v. Hoyos*, 151 F.3d 1, 7 (1st Cir. 1998); *Montgomery v. DeSimone*, 159 F.3d 120,

126-127 (3d Cir. 1998); *Otey v. Marshall*, 121 F.3d 1150, 1155 (8th Cir. 1997); *Hansen v. Black*, 885 F.2d 642, 645 (9th Cir. 1989).

And, as with the City Police Officers, even if there had been evidence of some involvement by the Supervisors in the handcuffing and continued handcuffing of Montes, the Supervisors would still have been entitled to the defense of qualified immunity, not only from liability but from suit. As this Court has held, unless the Supervisors engaged in conduct that any court could characterize, as a matter of law, as plainly incompetent or done in knowing violation of the Constitution, they are entitled to qualified immunity. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Given the absence of any such evidence in this record, the Supervisors would still be entitled to a judgment in their favor even if this Court granted review and, upon hearing, agreed with the arguments made in Montes's petition.

CONCLUSION

Montes's claims against all the defendants have been fully examined and dismissed. Montes has failed to articulate any reason why this Court should grant his petition for a writ of certiorari. The City Police Officers and the County Jail Supervisors respectfully

request, therefore, that this Court deny Montes's petition.

Respectfully submitted,

THOMAS P. PERKINS, JR.
Dallas City Attorney

JAMES B. PINSON
Assistant City Attorney
Counsel of Record
CITY ATTORNEY'S OFFICE
1500 Marilla Street, Room 7BN
Dallas, Texas 75201
214-670-3510 (voice)
214-670-0622 (facsimile)
Attorneys for Respondents
Jefferey P. Ransom and
Demarquis F. Black

CRAIG WATKINS
Criminal District Attorney

DOLENA T. WESTERGARD
Assistant District Attorney
FEDERAL SECTION
133 North Industrial Boulevard,
LB 19
Dallas, Texas 75207-4399
214-653-3692 (voice)
214-653-2899 (facsimile)
Attorneys for Respondents
Willie Faye Washington and
David Bonner